

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ORDER

Defendant Michael Perez pled guilty to Count 25 of the Fourth Superseding Indictment for possession with intent to distribute at least 50 grams of methamphetamine. On August 8, 2016, the Court sentenced Defendant to 168 months imprisonment. Defendant filed a motion for habeas corpus relief under 28 U.S.C. § 2255. The Court denied the motion as waived, except as to Grounds I and V, the latter of which the Court denied on the record. In Ground I, Defendant argued that trial counsel was ineffective for failing to file a notice of appeal despite Defendant having told him he wanted to appeal. The Court rejected Ground I, ruling that counsel cannot have been ineffective for failing to file a notice of an appeal where the right to appeal had been waived. The Court of Appeals vacated and remanded under *United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005). Although the Court of appeals has called the result “troubling,” so long as a defendant shows that his attorney disobeyed his instructions to appeal, there is ineffective assistance as far as the district court is concerned; it is for the Court of Appeals to dismiss the appeal as waived. *Id.* at 1197. Under these circumstances, the district court should hold an evidentiary hearing as to whether the defendant in fact told his attorney to appeal.

1 Alternatively, the Government may choose not to oppose the ground for appeal and permit an
2 appeal in order to “free itself from the restraint of the plea bargain, or because getting the appeal
3 dismissed would be less work than an evidentiary hearing.” *Id.* at 1198.

4 Accordingly, the Court ordered the Government to file a notice indicating whether it
5 intended to oppose Ground I on the evidence or not to oppose Ground I. The Government has
6 indicated it will not oppose Ground I and suggests the Court grant the motion under § 2255 as to
7 Ground 1 only and vacate and reenter the judgment of conviction, which will give Defendant 14
8 days to appeal.

9 **CONCLUSION**

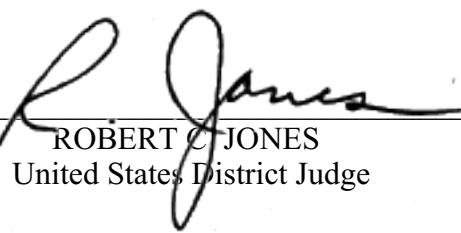
10 IT IS HEREBY ORDERED that the Motion (ECF No. 219) is GRANTED IN PART, as
11 to Ground 1, but is otherwise DENIED. A certificate of appealability is DENIED as to Grounds
12 2–5.

13 IT IS FURTHER ORDERED that the Judgment (ECF No. 191) is VACATED.

14 IT IS FURTHER ORDERED that the Clerk shall immediately reenter the Judgment (ECF
15 No. 191) anew as of the present date.

16 IT IS SO ORDERED.

17 DATED: This 11th day of March, 2019.

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19 ROBERT C. JONES
20 United States District Judge
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